

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Dakota Access, LLC**  
**Dakota Access Pipeline Project**  
**Siting Application**

**Case No. PU-14-842**

**SETTLEMENT AGREEMENT**

**September 20, 2017**

**Preliminary Statement**

On January 20, 2016, the Public Service Commission ("Commission") issued its Findings of Fact, Conclusions of Law and Order authorizing the construction, operation and maintenance of the Dakota Access Pipeline, approximately 358 miles of 12-, 20-, 24-, and 30-inch diameter crude oil pipeline and associated facilities in North Dakota.

On May 24, 2016, the Commission issued Supplemental Findings of Fact, Conclusions of Law and Order.

On June 22, 2016, the Commission issued Second Supplemental Findings of Fact, Conclusions of Law and Order.

On November 7, 2016, Public Service Commission Advocacy Staff ("Advocacy Staff") filed a formal complaint against Dakota Access, LLC ("Dakota Access") alleging that Dakota Access violated the Commission's Orders.

On November 30, 2016, Dakota Access filed a Motion to Dismiss Complaint.

On December 16, 2016, Advocacy Staff filed its response to the Motion to Dismiss, and on January 5, 2017, Dakota Access filed a reply.

On January 31, 2017, the Commission issued an Order denying the Motion to Dismiss.

On February 17, 2017, Dakota Access filed its Answer to the Complaint.

On May 31, 2017, the Commission issued an Order to Show Cause and Order Dismissing Complaint Without Prejudice and issued a Notice of Hearing on the Order to Show Cause. The Order to Show Cause addressed the Commission's allegations of non-compliance with law and Commission Orders by Dakota Access following an unanticipated discovery of a cultural resource and subsequent re-route of the Project route.

Also on May 31, 2017, the Commission opened an investigation under North Dakota Administrative Code section 69-02-01-08 regarding Dakota Access' compliance with North Dakota Century Code Title 49, North Dakota Administrative Code Title 69, and Commission Orders, excluding the issues to be addressed in the Order to Show Cause proceeding.

On June 21, 2017, a pre-hearing conference on the Order to Show Cause hearing was held.

On July 21, 2017, Advocacy Staff provided the Commission a Staff Memorandum in Response to Opened Investigation ("Memorandum"), which outlined information regarding the investigation undertaken by Advocacy Staff. The Memorandum outlined four possible violation topics identified by Advocacy Staff.

On July 26, 2017, the Commission adopted a Motion continuing the Order to Show Cause hearing.

On August 16, 2017, the Commission issued a Notice of Continued Hearing on Investigation.

### **Factual Background**

#### **I. The Dakota Access Pipeline Project and the Commission Complaint.**

Dakota Access filed applications for a certificate of corridor compatibility and a route permit concerning approximately 358 miles of 12-, 20-, 24-, and 30-inch diameter crude oil pipeline and associated facilities in Mountrail, Williams, McKenzie, Dunn, Mercer, Morton, and

Emmons Counties, North Dakota, and terminals near Stanley in Mountrail County, near Tioga in Williams County, near Epping in Williams County, near Trenton in Williams County, near Watford City in McKenzie County, and near Johnsons Corner in McKenzie County (“Project”). The Commission held three hearings on the Project and issued a corridor certificate and route permit to Dakota Access on January 20, 2016. The Commission issued Supplemental Findings of Fact, Conclusions of Law and Order and Second Supplemental Findings of Fact, Conclusions of Law and Order on May 24, 2016 and June 22, 2016, respectively. Dakota Access executed the Certification Relating to Order Provisions (“Certification”), which the January 20, 2016, May 24, 2016, and June 22, 2016 Orders incorporated.

Provisions of the Certification document, made a part of the Orders, required Dakota Access to do the following upon an unanticipated discovery of a cultural resource:

12. Company understands and agrees that if any cultural resource, paleontological site, archeological site, historical site, or grave site is discovered during construction, it must be marked, preserved and protected from further disturbances until a professional examination can be made and a report of such examination is filed with the Commission and the State Historical Society and clearance to proceed is given by the Commission.

\* \* \*

**38. ROUTE ADJUSTMENT WITHIN DESIGNATED CORRIDOR, NO AVOIDANCE AREA AFFECTED:** Before conducting any construction activities for any adjustment to the designated route within the designated corridor under NDCC 49-22-16.3(1), the Company will file:

- a. Certification and supporting documentation affirming that construction activities will be within the designated corridor, will not affect any known exclusion or avoidance areas within the designated corridor;
- b. Certification and supporting documentation, including a map meeting the requirements of N.D. Admin. Code § 69-06-04-01(2)(n) identifying the designated corridor, route and the route adjustment;
- c. Certification that Company will comply with the Commission’s order, law and rules designating the corridor and route.

The Commission retained Keitu Engineers & Consultants, Inc. ("Keitu") as independent construction inspectors for the Project on January 20, 2016. On October 25, 2016, Keitu filed a site inspection trip report with the Commission. The report stated during the site inspection on October 21, 2016, Keitu found an area flagged off from construction traffic and was informed by an Environmental Inspector with Dakota Access that "an unanticipated discovery was found on or around October 15, 2016 which resulted in a ROW reroute that was approved" by the North Dakota State Historic Preservation Office ("SHPO"). Dakota Access has indicated the unanticipated discovery occurred on October 17, 2016. Dakota Access had commenced construction of the re-route prior to notifying the Commission of the discovery of the cultural resource. Dakota Access had not, at that point in time, informed the Commission of the unanticipated discovery. Upon the request of the Commission, Dakota Access formally provided the Commission with information concerning the unanticipated discovery and route adjustment on October 27, 2016.

The Commission held a regular meeting on November 2, 2016. At the administrative matters portion of that meeting, the Commission discussed the unanticipated discovery and route adjustment that was reported to the Commission by Keitu. At the meeting, Commissioner Fedorchak instructed Commission staff to draft a formal Complaint against Dakota Access for possible violations of the Order.

A formal Complaint was prepared and filed by Advocacy Staff and was served on Dakota Access. The Complaint generally alleged that Dakota Access violated the Commission's Order by failing to report the unanticipated discovery and route adjustment to the Commission as required by N.D.C.C. § 49-22-16.3(1), and the January 20, 2016, May 24, 2016, and June 22, 2016 Orders, subjecting Dakota Access to penalties set forth at N.D.C.C. § 49-22-21.

Dakota Access did not Answer and instead filed a Motion to Dismiss the Complaint, and a supporting brief, on November 30, 2016. Commission advocacy staff filed a Response in Opposition to the Motion to Dismiss on December 16, 2016. Dakota Access filed a Reply Brief in Support of its Motion to Dismiss on January 5, 2017. On January 31, 2017, the Commission denied the Motion to Dismiss. Dakota Access filed an Answer on February 17, 2017.

## **II. Order to Show Cause**

The Commission determined that the Complaint brought against Dakota Access should be dismissed without prejudice and that an Order to Show Cause hearing, allowing Dakota Access to respond to the allegations of non-compliance with law and Commission Orders following the unanticipated discovery of a cultural resource and subsequent re-route of the Project route, was more efficient and appropriate than proceeding under the formal complaint process. After the Commission issued its Order to Show Cause on May 31, 2017, and dismissed without prejudice the Complaint, a pre-hearing conference for the Order to Show Cause hearing was held on June 21, 2017. Commission advisory counsel, Commission advocacy staff, counsel for Dakota Access, and the Administrative Law Judge were present at the pre-hearing conference.

The Commission learned at the pre-hearing conference that Dakota Access objected to the procedure in which the Commission was proceeding. Specifically, Dakota Access indicated it objected to the dismissal without prejudice of the Complaint that resulted in the Order to Show Cause being issued by the Commission. Dakota Access also indicated it objected to the burden of proof being placed on it, rather than the Commission, in the Order to Show Cause proceeding. The Administrative Law Judge issued a Summary of Prehearing Conference on June 23, 2017, that set forth a briefing schedule for the procedural issues to which Dakota Access objected. On July 26, 2017, the Commission adopted a motion to continue the Order to Show Cause hearing that had

been scheduled for August 16, 2017, and to continue the briefing schedule that the Administrative Law Judge issued on June 23, 2017.

### **III. Investigation**

On July 21, 2017, Advocacy Staff provided to the Commission a detailed Memorandum outlining factual issues of the investigation opened under North Dakota Administrative Code section 69-02-01-08 regarding Dakota Access' compliance with North Dakota Century Code Title 49, North Dakota Administrative Code Title 69, and Commission Orders, excluding the issues examined in the Order to Show Cause proceeding. Based on the investigation and opinion of Advocacy Staff, the Memorandum outlined four topics regarding possible violations:

1. Reroutes outside of the Order to Show Cause;
2. Tree and shrub removal;
3. Top soil removal and reclamation; and
4. Spill prevention plan.

A Hearing on Investigation was scheduled for August 17, 2017.

A pre-hearing conference for the Hearing on Investigation was held on August 3, 2017. Commission advisory counsel, Commission advocacy staff and counsel, counsel for Dakota Access, representatives for Dakota Access, and the Administrative Law Judge were present either in person or by telephone at the pre-hearing conference. The parties agreed to the scope of the Hearing on Investigation and discussed the procedures to be employed at the hearing. The Administrative Law Judge issued a Summary of Second Prehearing Conference on August 4, 2017, that set forth a schedule for various deadlines in advance of the Hearing on Investigation. On August 16, 2017, the Commission issued a Notice of Continued Hearing on Investigation that had been scheduled for August 17, 2017.

## **Agreement**

The Commission and Dakota Access hereby agree to settle the following pending issues in this administrative action: all issues addressed in the Order to Show Cause proceeding and the Investigation proceeding, on the following terms:

1. Dakota Access admits that it is subject to North Dakota Century Code ch. 49-22.1 (formerly ch. 49-22) and North Dakota Administrative Code Title 69, and that the Commission has jurisdiction over this matter.
2. The Commission has the authority to enter into this Settlement Agreement ("Agreement") under N.D.C.C. § 28-32-22.
3. Dakota Access is a Delaware limited liability company that owns and operates a pipeline that was permitted by the Commission in this case.
4. Dakota Access signed the Certification, subsequently attached to and made a part of the January 20, 2016, Order authorizing construction, which provided in part:

Company understands and agrees that if any cultural resource, paleontological site, archeological site, historical site, or grave site is discovered during construction, it must be marked, preserved and protected from further disturbances until a professional examination can be made and a report of such examination is filed with the Commission and the State Historical Society and clearance to proceed is given by the Commission.
5. Dakota Access is subject to the Certification and the Orders issued by the Commission in this matter.
6. On or about October 17, 2016, an unanticipated discovery occurred. Dakota Access immediately notified the Environmental Inspector for the Project and a Project Archaeologist was dispatched. The area was flagged off from construction traffic, Dakota Access consulted with SHPO, and engaged a team of specialists to make certain the site was marked, preserved and left undisturbed. A re-route of the site was formulated

in conjunction with SHPO and SHPO approved the re-route on October 18, 2016. Dakota Access did not provide information to the Commission about the re-route or the unanticipated discovery until after the re-route occurred.

7. The Commission and Dakota Access acknowledge a disputed question exists as to whether Dakota Access violated state law by not notifying the Commission pursuant to the Certification, as discussed in the Order to Show Cause proceeding.
8. The Commission and Dakota Access acknowledge a disputed question exists as to whether Dakota Access violated state law with respect to issues identified by the investigation, including reroutes outside of the Order to Show Cause, tree and shrub removal, top soil removal and reclamation, and Dakota Access' Spill Prevention Plan, as more specifically outlined in the Memorandum.
9. The parties to this Agreement have determined that settlement and compromise of the dispute is in the interests of their respective stakeholders and agree to resolve the Order to Show Cause proceeding and the Investigation proceeding without any fault or admissions being made by either party to the allegations made.
10. To resolve the issues raised in the Order to Show Cause regarding the unanticipated discovery of a cultural resource and subsequent re-route of the Project route:
  - a. Dakota Access agrees to develop, in cooperation and collaboration with the North Dakota State Historic Preservation Office ("SHPO") and the Commission, an industry reference manual for managing unanticipated discoveries and route changes during construction. The manual shall include a model unanticipated discovery plan and an explanation of the importance of communication and transparency with the



Commission on unanticipated discoveries and route changes during the construction process. The manual will be completed by December 31, 2017.

b. Dakota Access agrees to distribute the manual to registered pipeline companies in North Dakota, and conduct training programs on unanticipated discoveries and the Commission's route change process at the 2018 Williston Basin Petroleum Conference and at one other key industry function selected by Dakota Access, and approved by the Commission, by December 31, 2018.

c. Dakota Access agrees to pay the expenses and costs to bring a speaker of national or international renown to present to SHPO staff in Bismarck, North Dakota on a topic agreed to between SHPO and Dakota Access by December 31, 2018.

d. Dakota Access will provide notification of the completion of the items contained in paragraph 10(a)-(c) to Commission staff.

e. Dakota Access acknowledges that a utility must notify the Commission in writing prior to performing a route adjustment under Chapter 49-22.1. Dakota Access acknowledges a utility must notify and receive permission to proceed with construction upon an unanticipated site discovery.

11. To resolve the issues raised in the Memorandum prepared by Advocacy Staff in the Investigation, Dakota Access agrees as follows:

a. With respect to the potential violations identified by Advocacy Staff regarding route adjustments outside of the Order to Show Cause, Dakota Access agrees to produce a manual and provide training programs as outlined in paragraph 10(a)-(b) above. Dakota Access acknowledges that a utility must notify the Commission in writing prior to performing a route adjustment under Chapter 49-22.

b. With respect to issues identified by Advocacy Staff regarding tree and shrub removal, Dakota Access agrees to a modification of the Tree and Shrub Plan, as contained in the Certification, to provide for a 3:1 replacement ratio for those trees and shrubs removed from the areas identified in the Memorandum (the Tree and Shrub Plan shall remain a 2:1 replacement ratio for trees and shrubs outside of the areas identified in the Memorandum) and further agrees that it will provide and plant, or pay for the planting, of twenty thousand (20,000) trees in consultation with various county soil conservation districts traversed by the pipeline by December 31, 2018. The twenty thousand (20,000) trees to be provided by Dakota Access shall be at least two-year saplings of any of these species already identified by the conservation districts:

- i. Amur maple
- ii. Black Hills Spruce
- iii. Boxelder
- iv. Bur oak
- v. Colorado blue spruce
- vi. Eastern red cedar
- vii. Hackberry
- viii. Green Ash
- ix. Native Cottonwood
- x. Paper birch
- xi. Peachleaf willow
- xii. Ponderosa Pine

- xiii. Quaking aspen
  - xiv. Rocky Mountain juniper
  - xv. Sharpleaf Willow
- c. In the event Dakota Access is unable, due to supply of 2 year old saplings or other market conditions to procure the entire 20,000 trees referenced in 11(b) for planting on or before December 31, 2018, Dakota Access' obligation shall extend into the following year until such time as Dakota Access has provided and planted or cause to be planted the total aggregate quantity required.
- d. With respect to the topsoil removal and remediation issues identified in the Memorandum, no further inspection or investigation of those areas need be conducted by Dakota Access unless a landowner contacts Dakota Access or the Commission and indicates concern. In that event, Dakota Access agrees to inspect, with the participation of the Commission staff, the areas identified in the Memorandum with concerns raised by the landowner to investigate and address any issues related to defective reclamation or impacts to soil, so long as such areas of real property are not directly or indirectly involved in active litigation with Dakota Access, its contractors, agents, or representatives and the landowner(s) are not represented by counsel in a dispute with Dakota Access, its contractors, agents, or representatives and on condition that the owners of the real property consent to Dakota Access' inspections, testing protocols and related activities to be performed on their respective properties. Dakota Access agrees to pay the inspection costs of the Commission. Dakota Access agrees to complete the inspection and any testing within forty-five (45) days of notification to Dakota Access of a relevant landowner

concern. As it relates to landowner allegations of mixing top soil and subsoil received by Dakota Access or the Commission, organic matter, the pH, electric conductivity, exchangeable sodium percentage, and sodium adsorption ratio shall be tested, compared, evaluated and examined. If such testing and inspections reveal: (i) mixing of topsoil and subsoil greater than 25% by volume; and (ii) a reduction in productivity of the landowner's property, Dakota Access shall repair and remediate the area of concern within a reasonable amount of time in accordance with industry standards and Dakota Access' plans and specifications filed or referenced in PU-14-842.

- e. Any and all testing and inspections referenced in 11(d) shall be performed by licensed soil scientists with experience in large diameter pipeline construction.
- f. Dakota Access and the Commission recognize any easement agreement executed by a landowner in favor of Dakota Access establishes the relationship between the landowner and Dakota Access with respect to compensation for the easement, damages resulting from the construction, installation, operation of the pipeline, and loss of agricultural production. Therefore, as it relates to any landowner allegations, this Agreement is not intended and should not be construed to obligate Dakota Access to assume liabilities or conditions beyond those set forth in any easement.

- 12. Within ten days of execution of the Agreement by both parties, the Commission will dismiss, with prejudice, the Order to Show Cause proceeding it has pending against Dakota Access, its agents and representatives, related to the October 17, 2016, unanticipated discovery, and the Commission will dismiss, with prejudice, the November

7, 2016, Complaint. The Commission will also close the investigation and will not further pursue any potential or possible violations identified in the Memorandum against Dakota Access, its agents and representatives, related to any issues regarding reroutes outside of the Order to Show Cause, tree and shrub removal, top soil removal and reclamation, and Dakota Access' Spill Prevention Plan.

13. It is understood and agreed that this Agreement is the compromise of disputed claims, and that fulfillment of the terms of the Agreement is not to be construed as an admission of liability on any party, and that all parties deny liability and intend merely to avoid litigation.
14. Dakota Access acknowledges that it is waiving the rights and procedures that would otherwise protect it and that it would have in any formal administrative adjudicatory proceeding, investigation, or any civil action in a court of law, including the right to present evidence and witnesses, cross-examine Commission witnesses, administrative and judicial review, and to appeal any potentially adverse decision of the Commission.
15. The Commission acknowledges that, as it relates to the unanticipated site discovery issue outlined in the Order to Show Cause proceeding, Dakota Access took precaution in marking and protecting the archeological and cultural site by immediately addressing the discovery by roping off the area from construction traffic, posting flags, consulting with SHPO, and engaging a team of specialists to ensure that the site was left undisturbed during construction.
16. The Commission retains its continuing jurisdiction over this matter, PU-14-842, and nothing in this Agreement, excepting specifically identified issues that have been

resolved through settlement, shall be construed to limit or otherwise prevent the Commission from fulfilling its duties and responsibilities under state law.

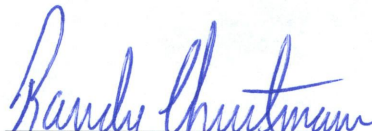
17. Dakota Access agrees that the Commission may issue an order incorporating the terms of this Agreement, and agrees that such an order may be enforced by a court of competent jurisdiction.
18. The Agreement is effective upon signature by both parties.
19. The parties to this Agreement agree that if any portion of this Agreement is determined to be void or unenforceable, such determination shall not affect the validity nor enforceability of the remaining portion.
20. The parties to this Agreement agree that it shall be interpreted under the laws of North Dakota and that any dispute arising out of the Agreement shall be brought in state or federal court in Burleigh County, North Dakota.

Signed this 20 day of September, 2017.

**PUBLIC SERVICE COMMISSION**



**Brian Kroshus**  
Commissioner



**Randy Christmann**  
Chairman



**Julie Fedorchak**  
Commissioner

Signed this \_\_\_\_\_ day of September, 2017.

**Dakota Access, LLC**

By: \_\_\_\_\_

Its: \_\_\_\_\_